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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. **816**

GULF OIL CORPORATION, *Petitioner*

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 715, AFL-CIO, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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OCTOBER TERM, 1958

No. .....

GULF OIL CORPORATION, *Petitioner*

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 715, AFL-CIO, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

Gulf Oil Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 16, 1958 (R. 103, App. 1), and judgment upon its petition for rehearing entered January 27, 1959 (R. 107, App. 2), reversing the judgment of the United States District Court for the Western District of Texas (R. 83-84), and remanding the cause to the District Court for further proceedings.

OPINIONS BELOW

The District Court granted petitioner's motion to dismiss for want of jurisdiction and entered judgment against respondent on its action against petitioner for

decree compelling arbitration of the Cantner discharge (R. 83-84). The opinion of the Court of Appeals (not yet reported) appears herein as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on December 16, 1958 (R. 103, App. 1) and petitioner's petition for rehearing was denied on January 27, 1959 (R. 107, App. 2). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. After the National Labor Relations Board has actually assumed and exercised jurisdiction of an employee's discharge as a claimed unfair labor practice, does a United States District Court have jurisdiction to proceed under Section 301, Labor Management Relations Act to force arbitration of the identical matter as a violation of a collective bargaining agreement?

2. After a union and an employer have expressly agreed that the collective bargaining agreement between them is subject to legislative enactments (including the National Labor Relations Act), which gives the National Labor Relations Board exclusive jurisdiction over unfair labor practices, does the union have a right to demand arbitration of an employee's discharge under a claim that he was discriminated

against by reason of his union activity, an unfair labor practice?

3. Did the Court of Appeals err in reversing the order of the District Court dismissing respondent's complaint?

STATUTES INVOLVED

The statutes under which petitioner contends that the National Labor Relations Board has exclusive jurisdiction of the Cantner discharge as an unfair labor practice, i.e., Section 7 and portions of Sections 8 and 10, of the National Labor Relations Act, as amended, are as set forth below:

29 U.S.C.A., Section 157 (61 Stat. 140) (Section 7 of the NLRA, as amended):

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a) (3) of this title."

29 U.S.C.A., Section 158 (61 Stat. 140) (Section 8 (a) (3) of the NLRA, as amended):

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce

employees in the exercise of the rights guaranteed in Section 157 of this title;

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *"

29 U.S.C.A., Section 160 (61 Stat. 146) (Section 10 (a) of the NLRA, as amended):

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 158 of this title) affecting commerce. *This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: . . .*" (Emphasis added)

Respondent seeks to maintain its suit against petitioner under authority of Section 301 of the Labor Management Relations Act, 29 U.S.C.A., Section 185 (61 Stat. 156):

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

Respondent sued under Section 301 of the Labor Management Relations Act to compel arbitration of the discharge by petitioner, an employer engaged in interstate commerce, of one K. T. Cantner, who was discharged by petitioner after he had been discovered doing work for another concern during his regular working hours for Gulf and while he was being paid by Gulf. Petitioner's position is that its right to hire and discharge its employees is a managerial prerogative which is in no wise limited or restricted by the terms of the collective bargaining agreement between it and the Union, and that it has not bargained away or restricted its right to hire and discharge its employees, including former employee Cantner (R. 9-10). At no time did petitioner consider the matter as a proper subject for a grievance or for the arbitration procedure under the contract (R. 56-60, 63, 78). Cantner himself had filed a grievance based on the claim that he was discharged because of a "secondary" job (R. 75). Respondent Union, after it had secured counsel, for the first time took the position that Cantner had been discriminated against on account of union activity (R. 61) and demanded arbitration of the claimed grievance. Prior to hearing in the Union's case against the Gulf, the National Labor Relations Board had assumed active jurisdiction of an alleged unfair labor practice claim filed by Cantner to the effect that he was discharged for "union activity" and not for cause.

Respondent's suit to compel petitioner to arbitrate

the Cantner discharge was contested by petitioner on the ground that there was no agreement to arbitrate the discharge under the collective bargaining agreement and on the further ground that, in any event, the National Labor Relations Board had exclusive jurisdiction of the claimed discharge for discrimination for union activities. Petitioner's motion to dismiss for want of jurisdiction was granted and judgment was entered for petitioner (R. 83-84) on a finding by the trial court that the complaint constituted an unfair labor practice within the meaning of the applicable law.

The Court of Appeals, in reversing and remanding the judgment of the trial court, held that the trial court's judgment "is contrary to the decision of this Court in *Lodge No. 12, etc., v. Cameron Iron Works, Inc.*, 257 F. 2d 467, and the cases in notes thereto Cf. *Item Co., v. N. O. Newspaper Guild*, 256 F. 2d 855." (R. 102, App. 3)

REASONS FOR GRANTING THE WRIT

The Court has not decided whether, after the National Labor Relations Board has actually assumed and exercised jurisdiction of an employee's discharge under allegations which may constitute an unfair labor practice, the United States District Court has jurisdiction to proceed to force arbitration under Section 301 of the Labor Management Relations Act as a violation of a collective bargaining agreement.

This is an issue of national importance involving construction of federal statutes governing labor rela-

tions, and this Court should settle this important question.

The Court of Appeals held that the judgment of the District Court in this case was contrary to its decision in *Lodge No. 12, etc., v. Cameron Iron Works, Inc.*, 257 F. 2d 467, but the facts in this case are entirely different from the facts in the *Cameron Iron* case, and the Court of Appeals in the case now before this Court has decided an important question of federal law which has not been, but which should be, settled by this Court.

In the case at bar, the National Labor Relations Board had assumed and had actually exercised jurisdiction over the employee's discharge as a claimed unfair labor practice at the time the case was heard in the District Court; whereas, in the *Cameron Iron Works* case, the Board had not assumed jurisdiction when the case was heard in the trial court. In the *Cameron* case, the Court of Appeals was concerned with the possibility of a long delay ensuing were the matter taken to the National Labor Relations Board as an unfair labor practice rather than being disposed of by arbitration under the contract. In the case at bar, however, the National Labor Relations Board assumed jurisdiction, and its General Counsel has sustained the ruling of the Regional Director that petitioner was not guilty of any unfair labor practice in discharging Canther, and the controversy is concluded. Therefore, the reason assigned by the Court of Appeals for its decision in the *Cameron* case is absent in the case at bar. Here, there is no situation giv-

ing rise to a necessity for "temporary assuagement" of the aggrieved party, "until a final disposition of the matter of unfair labor practice be made by the Board." We point out that by this very language, the Court of Appeals in the *Cameron* case, recognizes the right of the Board to make final disposition of any matter constituting an unfair labor practice. And if the NLRB has acted finally on the issue between the parties, there is nothing to arbitrate under the collective bargaining agreement. Certainly, jurisdiction of the courts under Section 301 would not empower them to provide a remedy different from and in conflict with one which the Board has provided for the same conduct. In other words, would a court be empowered to enforce an arbitration award which the Board has found to be contrary to the policies of the National Labor Relations Act, and thus, had decreed contrary relief. If such power exists in a court under Section 301, it could impair the effectiveness of the Board's unfair labor practice decisions and diminish the exclusive jurisdiction of the Board.

The Union takes the position that its action to compel arbitration belongs to the Union and that the discharged employee, and not it, filed the unfair labor practice before the Board, and that it should not be bound by what the employee did. The Union is simply the *collective bargaining agent* for Cantner and the alleged breach of contract and the unfair labor practice are one and the same, as is recognized by both the Union and Gulf (see R. 81 and 82, which is the "Charge Against Employer' filed by the Union's attor-

ney on behalf of the discharged employee). The allegations therein are the same allegations on which the Union itself attempted to base its case before the trial court (R. 15-16, 19-23, 32-39, 49, 61, 81-82).

In the case at bar petitioner and respondent expressly agreed in writing that the bargaining agreement is "subject to legislative enactments and governmental administration." (Defendant's Exhibit 2, p. 25) The National Labor Relations Act, as amended, is a legislative enactment; and it expressly provides that the National Labor Relations Board shall have exclusive jurisdiction over any matter which constitutes an unfair labor practice. Discharges are not arbitrable under the terms of the contract between petitioner and respondent, but even if the claimed discriminatory circumstances of Cantner's discharge in itself made the matter arbitrable, the respondent union, nevertheless, tacitly agreed that if it constituted an unfair labor practice, it was within the exclusive jurisdiction of the National Labor Relations Board, and the Union waived any possible right to have a discharge arbitrated.

It is a further fact that the contract in the case at bar is one of those referred to in the *Cameron Iron* case as being where "the controversy in question is specifically excluded." By making the agreement "subject to legislative enactments," petitioner and respondent specifically excluded from the arbitration process any matter constituting an unfair labor practice. This leaves nothing for an arbitrator to decide in the case at bar.

CONCLUSION

The National Labor Relations Board has assumed and exercised the exclusive jurisdiction granted it by the National Labor Relations Act, as amended, over the claimed unfair labor practice involved in the Gulf's discharge of K. T. Cantner as an alleged "discrimination for union activity." Even if the parties had not excluded matters involving unfair labor practices from the provisions of the collective bargaining agreement, submitting the issue of Cantner's discharge to an arbitration board will now be completely ineffectual for, under the *Cameron Iron Works* case, the National Labor Relations Board's disposition of the case is final.

This Court has not as yet, and should now, finally set to rest the important question as to whether, after the National Labor Relations Board has exercised its exclusive jurisdiction of an employee's discharge as an unfair labor practice, the United States District Court can proceed under Section 301 of the Labor Management Relations Act to force arbitration of the identical matter disposed of by the National Labor Relations Board.

It is accordingly urged that a writ of certiorari to review the judgment of the court below should be granted.

Respectfully submitted,

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Of Counsel

I, DAVID W. STEPHENS, counsel of record for Gulf Oil Corporation, petitioner herein, hereby certify that on the 14 day of April, 1959, I served copies of the foregoing petition for writ of certiorari on Sam Houston Clinton, Jr., attorney for respondent, International Union of Operating Engineers, Local No. 715, AFL-CIO, at his office, 204 V.F.W. Building, Austin 1, Texas, by United States mail in a duly addressed envelope with postage prepaid.

David W Stephens

DAVID W. STEPHENS

APPENDIX 1

JUDGMENT

No. 17408

Extract from the Minutes of December 16, 1958.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 715, AFL-CIO

versus

GULF OIL CORPORATION

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;

It is further ordered and adjudged that the appellee Gulf Oil Corporation, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX 2

ORDER DENYING REHEARING

No. 17408

Extract from the Minutes of January 27, 1959.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 715, AFL-CIO

versus

GULF OIL CORPORATION

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17408

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 715, AFL-CIO
Appellant,

versus

GULF OIL CORPORATION
Appellee.

Appeal from the United States District Court for the Western District of Texas.

(December 16, 1958.)

Before HUTCHESON, Chief Judge, and CAMERON and WISDOM, District Judges.

PER CURIAM: Alleging the existence of an agreement for arbitration, appellant, plaintiff below, brought this suit to compel arbitration of what was known to the parties as the Cantner grievance.

The district judge dismissed the suit on the motion of the defendant, that the court was without jurisdiction because the matters involved in the suit were within the exclusive jurisdiction of the National Labor Relations Board.

Appellant is here insisting that the judgment is contrary to the decision of this court in *Lodge No. 12, Etc. vs. Cameron Iron Works, Inc.*, 257 F(2) 467, and the cases cited in notes thereto. Cf. *Item Co. v. N. O. Newspaper Guild*, 256 F(2) 855.

We agree that this is so. The judgment is therefore REVERSED and the cause is REMANDED for further and not inconsistent proceedings.

A true copy

Test: /s/ EDWARD W. WADSWORTH
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit,
New Orleans, Louisiana

FEB. 13, 1959



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 816

GULF OIL CORPORATION, *Petitioner*

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 715, AFL-CIO, *Respondent*

GULF OIL CORPORATION'S PETITION FOR REHEARING OF ITS APPLICATION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 816

GULF OIL CORPORATION, *Petitioner*

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 715, AFL-CIO, *Respondent*

GULF OIL CORPORATION'S PETITION FOR REHEARING OF ITS APPLICATION FOR WRIT OF CERTIORARI

Comes Gulf Oil Corporation and files this, its petition for rehearing of its application for writ of certiorari and respectfully points out to this Honorable Court that certiorari should be granted on the following ground in addition to those heretofore presented.

The Court of Appeals has decided this case in a way in conflict with the decisions of other United States Courts of Appeals on the same subject matter. The Court of Appeals recognized that its opinion in *Machinist Lodge No. 12 vs. Cameron Iron Works, Inc.*, 257 F. 2d 467, was so in conflict, for it stated in that opinion (footnote 14, page 472):

> "The following cases held that the jurisdiction of the Board in the field of unfair labor practice would pre-empt state agencies or private arbitrators from acting: NLRB v. Wagner Iron Works,

7th Cir. 1955, 220 F. 2d 126; McAmis v. Panhandle Eastern Pipe Line Co., Mo. Ct. App. 1954, 273 S.W. 2d 789."

As the Court of Appeals cites the *Cameron Iron Works* decision as authority for its opinion in this case (R. 102), this case is in conflict with the decisions of the other United States Courts of Appeals on the same subject matter.

In the *Cameron Iron Works* case, the court holds that there is a distinction between contract provisions and matters committed exclusively to the Board. However, Section 10(a) of the National Labor Relations Act, as amended, recognizes no such distinction. This claimed distinction has also been rejected by various decisions of other courts of appeals. For example, in *National Labor Relations Board vs. Walt Disney Productions*, 146 F. 2d 44 (9th Circuit), the court holds contrary to the 5th Circuit when it says:

> "The Act itself contemplates a continuing jurisdiction by the Board over employer-employee relationships, for Section 160 (a) includes a provision that the Board's power over unfair labor practices 'shall be exclusive and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.' Clearly, agreements between private parties cannot restrict the jurisdiction of the Board."

And in *National Labor Relations Board vs. International Union*, 194 F. 2d 698 (7th Cir.), the Court says:

> "The Board's exclusive function in this field

> may not be displaced by action before State agencies or by arbitration. . . ."

In *National Labor Relations Board vs. Wagner Iron Works*, 220 F. 2d 126 (7th Cir.), the court states:

> "Furthermore, arbitration provisions in a bargaining agreement cannot oust the Board's jurisdiction to prevent unfair labor practices."

Since the Fifth Circuit is in conflict with other circuits on the question as to whether, after the National Labor Relations Board has actually assumed and exercised jurisdiction of an employee's discharge under allegations which may constitute an unfair labor practice, the United States District Court has jurisdiction to proceed to enforce arbitration under Section 301 of the Labor Management Relations Act as a violation of a collective bargaining agreement.

If the Court of Appeals decision in this case is permitted to stand, then we would have the legally indefensible situation of litigants having the right to twice hear each dispute. As this case now stands, the NLRB has found that by refusing to arbitrate the Cantner discharge petitioner has not been guilty of an unfair labor practice. By implication, the Board found that the contract did not require arbitration. If the District Court should hold otherwise, and require arbitration, then the effectiveness of Board unfair labor practice decisions would be impaired to the detriment of labor-management peace, and the exclusive nature of the Board's jurisdiction would be diminished.

This would create an intolerable situation and one

which this Court should not permit to occur, and the conflict which now exists between the circuits on this issue of national importance should be resolved by this Court granting petitioner's application for writ of certiorari.

It is accordingly urged that this petition for rehearing of petitioner's application for writ of certiorari to review the judgment of the court below should be granted.

Respectfully submitted,

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Of Counsel

I, CHAS. J. MURRAY, counsel of record for Gulf Oil Corporation, petitioner herein, hereby certify that on the 21 day of May, 1959, I served copies of the foregoing petition for rehearing of petitioner's application for writ of certiorari on Sam Houston Clinton, Jr., counsel of record for respondent, International Union of Operating Engineers, Local No. 715, AFL-CIO, at his office, 402 West 13th Street, Austin 1, Texas, by depositing the same in a United States mailbox with first class postage prepaid in an envelope addressed to such counsel of record for respondent at said post office address.

I further certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that such petition is restricted to substantial grounds available to petitioner not previously presented.

CHAS. J. MURRAY